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NO. 741

IN THE

Supreme Court of the United States

October Term, 1966

STRACHAN SHIPPING COMPANY, *Petitioner*

-versus-

ROYAL NETHERLANDS STEAMSHIP COMPANY,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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NO._____

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment in the United States Court of Appeals for the Fifth Circuit, initially entered in the above entitled case on June 27, 1966, with Petitioner's timely motion for rehearing denied on August 5, 1966.

CITATION TO OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit printed in Appendix "A" hereto, *infra*, p. 15, is reported in 362 F.2d 691 (1966). The District Court did not write an opinion as all of its findings were made by operation of law upon its entry of judgment.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was initially entered on June 27, 1966, and petitioner's timely motion for rehearing denied on August 5, 1966. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254(1). Jurisdiction in the District Court was predicated upon 28 U.S.C., Sec. 1332.

QUESTIONS PRESENTED

1. Can the Court of Appeals completely disregard the findings of fact made by the Trial Court upon entering judgment by operation of Rule 49(a)[1] and give the Plaintiff below (a steamship company) a new trial on issues which the Plaintiff had expressly refused to submit to the jury?

2. Can the Plaintiff below (a steamship company) be heard to complain of judgment for the Defendant (a stevedoring company) when there has been a complete failure by the Plaintiff to sustain its burden of proving and then requesting and obtaining fact findings from the jury essential to its right to recovery?

STATEMENT

This case has as its setting a situation not at all uncommon to the field of maritime personal injury litigation. B. A. Rawlinson, a longshoreman, was employed by

[1] The portion of Rule 49(a) of the Federal Rules of Civil Procedure which is the subject matter of this writ is as follows: "If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. **As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.**" (Emphasis supplied)

Strachan Shipping Company, a local stevedore, to assist in loading a cargo of steel pipe aboard the SS MENTOR, a vessel owned by Royal Netherlands Steamship Company. Rawlinson was injured on July 23, 1956, while working on the wharf as the result of being caught between a load of pipe and the vessel's inshore side during the time that the load was being operated by the vessel's winches. Rawlinson's action against the vessel owner was predicated upon a malfunction of the winches, and the vessel owner, in an attempt to obtain indemnity, thereafter impleaded the stevedore. The vessel owner obviously appreciated the likelihood of Rawlinson being successful on the liability issue since the third party action was settled for $20,000; however, the indemnity action was retained on the Trial Court's docket with the shipowner proceeding to trial on the theory that Rawlinson's injury resulted from the negligent conduct of the stevedore's employees. Henceforth, for convenience, the parties will be referred to as they were by the Court of Appeals below, simply as Rawlinson (injured longshoreman), Royal (shipowner) and Strachan (stevedore).

Royal's action for indemnity was tried to a jury with Royal having the burden of proving and obtaining fact findings on the following issues:

1. That the settlement made by Royal with Rawlinson was a reasonable one under all the circumstances.
2. That Strachan breached its warranty of workmanlike service to Royal and that such breach was a proximate cause of the accident.
3. That Strachan had no defense to Royal's indemnity claim, that is, that the conduct of Royal was not sufficient to preclude indemnity.

There is no dispute that this was Royal's burden and the pre-trial stipulation of the parties so stated.[2]

Interrogatories were submitted to the jury pursuant to Rule 49(a) of the Federal Rules of Civil Procedure, and all interrogatories and instructions given by the Trial Court were those submitted by and requested by Royal[3] with full assurance to the Trial Court that every aspect of the case was adequately submitted.[4] Not one of Royal's suggested

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[2] R. 84-85. Royal contended that two of the ultimate issues were "3. Did 'Strachan' breach the implied warranty" (the implied warranty of performing the stevedoring operations in a reasonably safe and workmanlike manner) and "6. Was 'Royal' guilty of any conduct which would preclude 'Royal' from recovering indemnity from 'Strachan'?" (Parenthetical expression added from paragraph 2 of the stipulated issues.) See also **Damanti v. A/S Inger,** 314 F. 2d 395, 397 (2nd Cir., 1963), cert. denied at 358 U.S. 834, 11 L.Ed.2d 64, 84 S.Ct. 46 (1963). This Court has held that these two ultimate issues are issues of fact warranting submission to the jury. **Weyerhaeuser Steamship Company v. Nacirema Operating Company,** 355 U.S. 563, 567, 2 L.Ed.2d 491 (1958).

[3] The Trial Court on numerous occasions advised Royal that the charge and interrogatories would conform exactly to Royal's request (R. 40, 42-46, 51, 64, 65, 77 and 79). A perfect example is the Trial Court's decision as set forth at page 51 of the record: "I have decided to submit this case as the plaintiff wants it submitted, and so whatever the plaintiff wants in that respect I will grant it and defendant may have his exceptions."

[4] The Trial Court commented commencing at the bottom of page 42 of the record, "Since you cannot (agree), I am inclined to submit the case exactly as the plaintiff wants it submitted, and let the plaintiff stand or fall on the verdict." The reply given by Royal was: "Needless to say, Your Honor, I have no objection to that. That would be just fine." (Parenthetical expression added)

Royal further advised the Trial Court at page 84 of the record, "If Your Honor pleases: I think if I might say this, so far as the framing of these interrogatories is concerned, I believe your Honor's ultimate decision to do that was entirely correct * * *."

Strachan pointed out to the Trial Court in its exceptions to the charge and interrogatories that there was no inquiry as to whether or not the stevedore breached its warranty of workmanlike service

interrogatories or instructions were denied by the Trial Court and Royal made no objections or exceptions to the charge and made no demand that any other issues be submitted. At the request of Royal, the Trial Court inquired of the jury if the settlement with Rawlinson was reasonable, but Royal neither requested nor did the Trial Court ask the jury to determine the two other remaining facts essential to a judgment in favor of Royal—(1) Did the conduct of Strachan amount to a breach of its warranty of workmanlike service (with the necessary finding on the causation issue to follow) and (2) was Royal's conduct sufficient to preclude a reward of indemnity?

The glaring omission of these two issues by Royal in its charge was apparent to Strachan, whose attorneys requested that these two ultimate fact issues be submitted to the jury.[5] Upon Royal's insistence that these issues did not need to be submitted to the jury, the Trial Court did not submit them.

The jury answered all interrogatories propounded to it,[6] but the jury at no time made findings upon two of the ultimate issues necessary for a judgment in favor of Royal. With these two fact issues being unresolved, the Trial Court exercised its prerogative as provided by Rule 49(a) and

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(R. 72) or if the vessel owner's conduct was sufficient to preclude indemnity (R. 76), and when the Trial Court inquired of Royal if any objections were in order, the reply given was "None is good sir." (R. 77)

[5] Even though Royal was the party obliged to obtain affirmative answers to the two disputed issues of fact, Strachan requested that the interrogatories be submitted (R. 102-103) and excepted to the Trial Court's failure to include them (R. 72 and 76) because of its desire to bring the litigation to a conclusion.

[6] The interrogatories and answers given by the jury are set forth within Appendix "B". It will be noted that the interrogatories do not consist of ultimate issues but rather points of evidence upon which there was a conflict.

entered judgment in favor of Strachan. In so doing, as the plain and unequivocal language of Rule 49(a) provides, the Trial Court "shall be deemed to have made a finding in accord with the judgment." That is, by the plain operation of the Rule 49(a), these two issues which Royal refused to submit to the jury were both resolved against Royal and in favor of Strachan.

Royal filed a timely notice of appeal with the Court of Appeals for the Fifth Circuit, and Strachan filed a protective cross-appeal.[7] The Court of Appeals reversed the Trial Court's judgment and remanded the case for a new trial on the ground that some of the interrogatories were answered by the jury in an inconsistent manner.[8] The inconsistencies in the answers by the jury to the insufficient interrogatories requested by Royal were in no way relied on by the Trial Court in entering judgment for Strachan. Even if the answers had been completely consistent, the Trial Court would still have had to enter judgment for Strachan. In relying on these inconsistencies as a basis for reversal, the Court of Appeals completely ignored the applicability of Rule 49(a) and, although vigorously urged to do so by Strachan both on initial submission and on petition for rehearing, refused to consider Rule 49(a) to any extent. The only possible explanation for this conduct of the Court of Appeals is that it could think of no reasonable basis on which it could reverse the Trial Court's

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[7] The cross-appeal was deemed necessary due to the errors sanctioned by Royal in the Trial Court's charge and interrogatories. Obviously, Royal had no standing to rely upon these errors, and Strachan deemed the protective cross-appeal necessary in order to prevent the Court of Appeals from reversing and rendering judgment in favor of Royal.

[8] The Court of Appeals failed to recognize that only one of the interrogatories submitted to the jury was essential to judgment in favor of the Defendant.

judgment if Rule 49(a) was properly applied as had been done by the same Court of Appeals in two of its own earlier decisions[9] and by the Court of Appeals for the Eighth[10] and Tenth Circuits.[11]

REASONS FOR GRANTING THE WRIT

I. The refusal of the Court of Appeals to recognize the clear applicability of Rule 49(a) is directly in conflict with:

(1) Two of its own previous decisions:

(a) *Delta Engineering Corp. v. Scott*, 5 Cir., 1963, 322 F.2d 11.

(b) *L'Urbaine et la Seine v. Rodriguez*, 5 Cir., 1963, 268 F.2d 1.

(2) With the decision of the Court of Appeals for the Tenth Circuit in:

Aetna Insurance Co. v. Rhodes, 10 Cir., 1948, 170 F.2d 111.

(3) With the decision of the Court of Appeals for the Eighth Circuit in:

Hinshaw v. New England Mutual Life Insurance Co., 8 Cir., 1939, 104 F.2d 45.

This Court should grant this writ to resolve this conflict.[12]

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[9] **Delta Engineering Corp. v. Scott**, 322 F.2d 11, 17 (5th Cir., 1963); and **L'Urbaine et la Seine v. Rodriguez**, 268 F.2d 1, 4 (5th Cir., 1959).

[10] **Hinshaw v. New England Mutual Life Insurance Co.**, 104 F.2d 45, 48 (8th Cir., 1939).

[11] **Aetna Insurance Co. v. Rhodes**, 170 F.2d 111, 115 (10th Cir., 1948).

[12] See full discussion, **infra**, pages 8 to 11.

2. This Court has never ruled upon the scope or application of Rule 49(a) and the failure of the Court of Appeals to give it efficacy in a case clearly within its plain and unequivocal terms presents an important question which this Court should settle to insure the proper administration of cases at the trial court level.[13]

3. In reversing the Trial Court, the Court of Appeals also ignored the basic and fundamental rule of law that the party having the burden of proof must request and obtain all of the jury findings essential to judgment sought.[14]

REASON ONE

Rule 49(a) expressly provides that where, as here, a case is submitted to the jury by the Court on interrogatories that

> ". . . If in so doing the Court (1) omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires (2) he demands its submission to the jury. (3) As to an issue omitted without such demand, the Court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict." (Parenthetical expressions added).

This case falls squarely within this rule because:

(1) At Royal's insistence, the Court's charge omitted two essential issues of fact.

(2) Royal did not demand their submission to the jury before it retired.

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[13] See full discussion, **infra**, pages 11 to 12.

[14] See full discussion, **infra**, pages 12 to 14.

(3) In the absence of such demand by Royal, the Trial Court is deemed to have found such issues in accord with its judgment (That is, in favor of Strachan in this case.)[15]

Notwithstanding these undisputed facts which made this a clear case for the application of Rule 49(a), the Court of Appeals below declined to even mention the Rule and in so doing reached a result that is in direct conflict

1. With two of its own decisions in

   Delta Engineering Corp. v. Scott, 5 Cir., 1963, 322 F.2d 11.

   L'Urbaine et la Seine v. Rodriguez, 5 Cir., 1963, 268 F.2d 1.

2. With the decision of the Court of Appeals for the Eighth Circuit in

   Hinshaw v. New England Mutual Life Insurance Co., 8 Cir., 1939, 104 F.2d 45.

3. With the decision of the Court of Appeals for the Tenth Circuit in

   Aetna Insurance Co. v. Rhodes, 10 Cir., 1948, 170 F.2d 111.

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[15] There is ample evidence in the record in support of these conclusions. The high boom winch operator's testimony was that prior to the accident, he complained to one of the vessel's officers concerning the condition of the winch and that no remedial measures were taken. The following decisions have denied the remedy of indemnity in a similar situation: **Hodgson v. Lloyd Brasileiro Patrimonio Nacional**, 294 F.2d 32 (3rd Cir., 1961), cert. denied 369 U.S. 848, 8 L.Ed.2d 8, 82 S.Ct. 931 (1963); **Smith v. Pan-Atlantic Steamship Corporation**, 161 F.Supp. 422, aff'd. per curiam at 254 F.2d 600 (3rd Cir., 1958); and **Hagans v. Farrell Lines, Inc.**, 237 F.2d 477 (3d Cir., 1956).

All of the foregoing cases follow the plain and unequivocal language of Rule 49(a) which if followed by the Court of Appeals below would have required affirmance of the Trial Court's judgment. But by reversing this case and giving Royal a new trial, the Court of Appeals rewards Royal for not complying with the clear requirements of Rule 49(a). Royal not only did not demand that these two issues be submitted but led the Trial Court into clear error by assuring the Trial Court that they were not necessary.

Rule 49(a) states very simply and categorically that as to an issue omitted from the jury's consideration, the Trial Court is deemed to have made a finding in accord with the judgment unless the complaining party (Royal here) has demanded that the issue be submitted to the jury. In fact, it is difficult to conceive of a more graphic illustration of a case to which Rule 49(a) clearly applies.

The very purpose of Rule 49(a) is to require both Plaintiff and Defendant to demand the submission of all of the essential facts to the jury and if they do not, the Trial Court resolves them upon entry of the judgment. But the decision of the Court of Appeals below permits this Plaintiff (Royal) to request an incomplete charge and when it can't get a judgment on it, to then have a new trial. Followed to its logical conclusion, the decision of the Court of Appeals below would permit Royal to keep failing to comply with Rule 49(a) by submitting incomplete charges indefinitely, always with the assurance that it would get a new trial.[16]

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[16] The Court of Appeals' basic error was in holding that the Trial Court's judgment was dependent upon the jury's answers to

It is this type of conduct which Rule 49(a) was designed to prevent. It is most important that this Court make this perfectly clear so the plain mandate of Rule 49(a) will not be ignored by the Court of Appeals again. To do otherwise is to invite repeated error in the submission of interrogatories always with the assurance that a new trial would be granted whether a demand has been made for a particular issue or not. The result would be chaos in the trial courts.

REASON TWO

This Court has never ruled upon the scope or application of Rule 49(a) and the failure of the Court of Appeals to give it efficacy in a case clearly within its plain and unequivocal terms presents an important question which this Court should settle to insure the expeditious and proper administration of justice at the trial court level.

If the present case is not one for the application of Rule 49(a), what else is necessary to give a judgment finality under this Rule? This Court has never considered the scope of Rule 49(a), and while it is obvious from the language of the Rule that it clearly applies to this case, the Court of Appeals has refused to do so. If the Court of Appeals below is permitted to ignore the unequivocal

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certain interrogatories which were in conflict. The Trial Court's judgment is completely independent of any conflicts in the answers to the interrogatories submitted to the jury, and is based upon the failure of Royal to demand the submission of the two other interrogatories which were essential to establish Royal's right to recover, if any.

language of the Rule without any explanation for doing so, what then is to prevent other courts from doing likewise? Only this Court can authoritatively reaffirm the plain meaning of Rule 49(a). As it is one of the most important Rules in the orderly administration of justice at the trial court level, it is respectfully submitted that this Court should grant this Petition in order that when this Rule is to be applied and when it can be ignored may be understood by both the bench and the bar.

REASON THREE

In reversing the Trial Court, the Court of Appeals also ignored the basic and fundamental rule of law that the party having the burden of proof must request and obtain all the jury findings which are essential to support the judgment sought. This poses the second question presented by this Petition:

> Can the Plaintiff below (a steamship company) be heard to complain of judgment for the Defendant (a stevedoring company) when there has been a complete failure by the Plaintiff to sustain its burden of proving and then requesting and obtaining fact findings from the jury essential to its right to recovery?

The basic error made by the Court of Appeals in reversing this case was in concluding that the Trial Court's judgment was based to any extent on the answers made by the jury to the interrogatories submitted to it.

The judgment of the Trial Court below does not depend to the slightest extent on any of the answers of the jury, but rests firmly on one of the most fundamental and basic principles in American jurisprudence—that a Plaintiff who fails to sustain his burden of proof by obtaining fact

findings on all elements essential to its recovery, is not entitled to a judgment, and judgment must be rendered for the Defendant. This principle is as old as the law itself and as basic to our American system of justice as Courts and Judges. And its application is particularly appropriate in this case where Strachan did everything it possibly could to have the essential elements of Royal's case submitted to the jury and it was only upon the insistence of Royal that these additional interrogatories need not be submitted that the Court declined to do so. For submitting a charge to the Court which could under no circumstances have supported a judgment in its favor, Royal is rewarded with a new trial and Strachan, who did everything it could to insure that all of the fact issues were submitted to the jury in a proper manner is penalized by having to undergo the costs and expense of a new trial to establish its non-liability to Royal.

The Court of Appeals' opinion if permitted to stand has some awesome and far-reaching implications. This for the reason that the reversal and remand of this case for a new trial constitutes a holding that a Plaintiff in the Trial Court does not have the burden of proving and obtaining fact findings by a jury on the essential elements to support its claim for relief. The effect of this remand for a new trial is to hold that a plaintiff no longer has the burden of proving and obtaining the fact findings essential to support its claim, and even though it does not request that the essential elements of its cause of action be submitted to the jury, it does not lose its lawsuit, but simply will be given a second trial at which presumably the Plaintiff will submit all of the essential elements of its cause of action. If on the second trial Royal again fails to request some of the elements essential to its claim for indemnity and

the Trial Court again enters a judgment in favor of Strachan, then, if the opinion in this case is permitted to stand, wouldn't the Court of Appeals again have to reverse for a third trial? Wouldn't this have to go on through as many trials and appeals as might be necessary until the Plaintiff finally requested and had submitted to the jury all of the fact issues essential to its recovery in a single trial? Certainly this Court will not sanction any such result as this.

This is not a matter of significance only in this individual case, but goes to the very heart of our judicial system. If this basic and fundamental concept of American jurisprudence is to be so lightly regarded, endless repeated trials of the same lawsuits will result. The orderly administration of justice at the trial court level requires that this Court reaffirm this basic and fundamental rule of law which for some completely unexplained reason the Court of Appeals declined to consider.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

E. D. VICKERY,
Counsel for Petitioner

November 1, 1966.

APPENDIX A

Opinion Below

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21622

ROYAL NETHERLANDS STEAMSHIP COMPANY,
Appellant,

—versus—

STRACHAN SHIPPING COMPANY, *et al.,*
Appellees.

STRACHAN SHIPPING COMPANY,
Appellant,

—versus—

ROYAL NETHERLANDS STEAMSHIP COMPANY,
Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

(June 27, 1966.)

Before:

JONES and THORNBERRY, *Circuit Judges,*
and SLOAN, *District Judge.*

JONES, *Circuit Judge:* B. A. Rawlinson, a longshoreman employed by the appellee, Strachan Shipping Company, was injured while participating in the loading of a vessel of the appellant, Royal Netherlands Steamship Company,

at a dock in Houston, Texas. He was crushed between a load of pipe, which was being raised from the dock, and the vessel. Strachan's insurance carrier settled with Rawlinson on his Texas workmen's compensation claim. He then sued Royal Netherlands in a state court, claiming unseaworthiness of the vessel and negligence of its owner. Royal Netherlands removed the case to the Federal court, settled with Rawlinson, and filed a third-party complaint against Strachan seeking indemnity. The district court entered a summary judgment for Strachan on the ground that the discharge of its state compensation liability discharged it from all liability arising out of Rawlinson's injury. *Rawlinson v. Koninklyke Nederlandsche Stoomboot Maalschappy, N.V.*, 197 F.Supp. 201. This court reversed, holding that under the Ryan doctrine,[1] a state rule of workmen's compensation law cannot prevent a shipowner from enforcing a contractual right of indemnity against a stevedore. *Koninklyke Nederlandsche Stoomboot Maalschappy, N.V. v. Strachan Shipping Company*, 301 F.2d 741, reh. den. 304 F.2d 545.

The injuries of Rawlinson were sustained while he was engaged, with others, in loading the cargo of pipe on the SS Mentor, owned by Royal Netherlands. A length of pipe was being raised from the dock to the ship by two winches. It appeared to C. E. Hartley, one of Strachan's winchmen, that one end of the pipe might strike a shroud. He stopped his winch and signaled W. E. Hedigar, Strachan's other winchman, to stop his winch. There is a dispute as to whether Hedigar missed the signal and did not attempt to stop the winch, or the winch was defective and did not

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[1] Ryan Stevedoring Co. v. Pan-Atlantic Corporation, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133; Weyerhaeuser Steamship Co. v. Nacirema Operating Co., 355 U.S. 563, 78 S.Ct. 438, 2 L.Ed.2d 491.

respond to the winchman's effort to stop it. The winch continued to operate causing the low end of the pipe to swing in against the ship. Rawlinson was caught between the pipe and the ship and the resulting injuries initiated this litigation. Rawlinson's action against Royal Netherlands, in which he asserted both negligence and unseaworthiness, was settled by the payment of $20,000 by Royal Netherlands. It reserved the right to seek indemnity from Strachan. As has been noted, its right to do so was established on the prior appeal.

At the conclusion of the trial the court submitted special interrogatories under Rule 49(a), Fed. Rules Civ. Proc. 28 U.S.C.A. at the request of Royal Netherlands and in the form requested by it. Objections to the interrogatories made by Strachan were overruled and interrogatories requested by Strachan were refused. The questions propounded and the answers returned are as follows:

1. Was it reasonable for Royal to settle Mr. Rawlinson's suit?

You will answer "Yes" or "No".

Answer: Yes

2. Was the high boom winch unseaworthy?

You will answer "Yes" or "No".

Answer: No.

3. (a) did the high boom winchman continue to operate the winch after he knew that the winch was defective?

Answer: "Yes" or "No".

Answer: Yes

(b) If so, was this one of the contributing causes of the accident?

You will answer "Yes" or "No".

Answer: No.

4. (a) Did the gang foreman fail to stop the high boom winchman from continuing to operate the winch after the gang foreman knew or should have known that the winch was defective?

You will answer "Yes" or "No".

Answer: Yes

(b) If so, was this one of the contributing causes of the accident?

You will answer "Yes" or "No".

Answer: No.

5. (a) Should Strachan have provided one signalman to give all signals necessary to get the pipe which struck Mr. Rawlinson onto the ship?

You will answer "Yes" or "No".

Answer: Yes

(b) If so, was the failure to provide the signalman one of the contributing causes of the accident?

You will answer "Yes" or "No".

Answer: Yes

6. (a) Did either the outrigger winchman or the high boom winchman move the pipe which struck Mr. Rawlinson without receiving a signal to do so?

You will answer "Yes" or "No".

Answer: "No".

(b) If so, was this one of the contributing causes of the accident?

You will answer "Yes" or "No".

Answer: "No".

7. (a) Did either the outrigger or high boom winchman move the pipe which struck Mr. Rawlinson without being able to see whether or not Mr. Rawlinson was between the pipe and the ship?

You will answer "Yes" or "No".

Answer: "Yes".

(b) If so, was this one of the contributing causes of the accident?

You will answer "Yes" or "No".

Answer: "Yes".

8. (a) Was there a tag line on the pipe which struck Mr. Rawlinson?

You will answer "Yes" or "No".

Answer: "No".

(b) If not, was this one of the contributing causes of the accident?

You will answer "Yes" or "No".

Answer: "Yes".

9. Was Strachan's failure to use a double sling to load

the pipe which struck Mr. Rawlinson one of the contributing causes of the accident?

You will answer "Yes" or "No".

Answer: "No".

10. Did either the outrigger or high boom winchman raise the pipe which struck Mr. Rawlinson in such a manner that there was danger that the pipe would strike the shroud?

You will answer "Yes" or "No".

Answer: Yes

11. (a) Did Strachan negligently bring into play any defective condition of the high boom winch?

You will answer "Yes" or "No".

Answer: No

12. Was a contributing cause of the accident the failure of Mr. Rawlinson to exercise reasonable care for his own safety?

You will answer "Yes" or "No".

Answer: Yes

After the jury and retired, a note from the jury was sent in, making this inquiry:

> "Some questions that follow question No. 2 seem to assume that question No. 2 be answered in the affirmative. However, if No. 2 is answered in the negative, answers to some associated questions seem to be contradictory. Please clarify."

After some discussion, and over the objection of Strachan, the court gave this supplemental instruction:

> "You are instructed to answer each question individually on the basis of the evidence and without regard to the effect which any answer may have upon the judgment to be entered by the court."

Royal Netherlands and Strachan each moved for judgment on the verdict. The motion of Strachan was granted. Royal Netherlands has appealed, and on appeal contends that the cause of the longshoreman's injury was attributable to the stevedore and its employees. It insists that the jury verdict made findings which required a judgment against Strachan, the stevedore. While insisting upon the correctness of the judgment and claiming that the verdict required the entry of the judgment for it, Strachan has attempted to take what it has called a "conditional and protective cross-appeal." In its support of this cross-appeal it urges that the district court's charge and interrogatories are erroneous. But by a sort of Hudibrastic reasoning, Strachan argues that because Royal Netherlands prepared the instructions and interrogatories it is estopped from challenging the court's judgment.

The framing of questions in such form as to anticipate or assume particular answers to prior questions, coupled with the court's instruction, given in response to an inquiry by the jury, that each question be answered without regard to the effect of any answer upon the court's judgment, undoubtedly created confusion in the minds of the jurors. This confusion, no doubt, caused the inconsistency and conflicts in the jury's responses to the questions as submitted. The jury found that the high boom winch was not unseaworthy but was required to assume that it was defective. The jury found that Strachan should have provided a signal-

man and its failure to do so was a contributing cause of the accident, but that the winchman had not moved the pipe without signals. Other comparisons might be made. The inconsistencies and conflicts cannot be reconciled.

Where the answers of the jury, upon which the court's judgment depends, are so ambiguous, or so conflicting and inconsistent that they cannot be reconciled, a special verdict will not support a judgment and the cause must be reversed for a new trial. Martin v. Gulf States Utilities Company, 5th Cir. 1965, 344 F.22d 34; R. B. Company v. Aetna Insurance Company, 5th Cir. 1962, 299 F.2d 753; Missouri Pacific Railroad Company v. Salazar, 5th Cir. 1958, 254 F.2d 847; Mounger v. Wells, 5th Cir. 1929, 30 F.2d 521. Such is the case here. The judgment of the district court is reversed and the cause remanded for a new trial. The cross-appeal falls with the reversal on the main appeal.

REVERSED AND REMANDED.

APPENDIX B

ANSWERS OF THE JURY TO INTERROGATORIES PROPOUNDED TO IT BY THE COURT UNDER THE PROVISIONS OF RULE 49(A) OF THE FEDERAL RULES OF CIVIL PROCEDURE

1. Was it reasonable for Royal to settle Mr. Rawlinson's suit?

You will answer "Yes" or "No".

Answer: Yes

2. Was the high boom winch unseaworthy?

You will answer "Yes" or "No".

Answer: No

3. (a) Did the high boom winchman continue to operate the winch after he knew that the winch was defective?

Answer: "Yes" or "No".

Answer: Yes

(b) If so, was this one of the contributing causes of the accident?

You will answer "Yes" or "No".

Answer: No

4. (a) Did the gang foreman fail to stop the high boom winchman from continuing to operate the winch after the gang foreman knew or should have known that the winch was defective?

You will answer "Yes" or "No".

Answer: Yes

(b) If so, was this one of the contributing causes of the accident?

You will answer "Yes" or "No".

Answer: No

5. (a) Should Strachan have provided one signalman to give all signals necessary to get the pipe winch struck Mr. Rawlinson onto the ship?

You will answer "Yes" or "No".

Answer: Yes

(b) If so, was the failure to provide the signalman one of the contributing causes of the accident?

You will answer "Yes" or "No".

Answer: Yes

6. (a) Did either the outrigger winchman or the high boom winchman move the pipe which struck Mr. Rawlinson without receiving a signal to do so?

You will answer "Yes" or "No".

Answer: No

(b) If so, was this one of the contributing causes of the accident?

You will answer "Yes" or "No".

Answer: No

7. (a) Did either the outrigger or high boom winchman move the pipe which struck Mr. Rawlinson without

being able to see whether or not Mr. Rawlinson was between the pipe and the ship?

You will answer "Yes" or "No".

Answer: Yes

(b) If so, was this one of the contributing causes of the accident?

You will answer "Yes" or "No".

Answer: Yes

8. (a) Was there a tag line on the pipe which struck Mr. Rawlinson?

You will answer "Yes" or "No".

Answer: No

(b) If not, was this one of the contributing causes of the accident?

You will answer "Yes" or "No".

Answer: Yes

9. Was Strachan's failure to use a double sling to load the pipe which struck Mr. Rawlinson one of the contributing causes of the accident?

You will answer "Yes" or "No".

Answer: No

10. (a) Did either the outrigger or high boom winchman raise the pipe which struck Mr. Rawlinson in such a manner that there was danger that the pipe would strike the shroud?

You will answer "Yes" or "No".

Answer: Yes

(b) If so, was this one of the contributing causes of the accident?

You will answer "Yes" or "No".

Answer: Yes

11. (a) Did Strachan negligently bring in to play any defective condition of the high boom winch?

You will answer "Yes" or "No":

Answer: No

(b) If so, was this one of the contributing causes of the accident?

You will answer "Yes" or "No".

Answer: No

12. Was a contributing cause of the accident the failure of Mr. Rawlinson to exercise reasonable care for his own safety?

You will answer "Yes" or "No".

Answer: Yes

Dated: February 6, 1964.

(Signed) WAYNE M. ARMBRECHT
FOREMAN